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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM T. GRAHAM and GRAHAM PLOW, INC.,
Petitioners,

v.

JOHN DEERE COMPANY OF KANSAS CITY and
DEERE & COMPANY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF ON BEHALF OF AMERICAN BAR ASSOCIATION, AMICUS CURIAE

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BRIEF ON BEHALF OF AMERICAN BAR ASSOCIATION, AMICUS CURIAE

THE INTEREST OF THE AMICUS CURIAE

This case involves the interpretation of Section 103 of the Patent Act of 1952, Title 35, United States Code, Act of July 19, 1952, c. 950, 66 Stat. 792. Section 103 was a new provision in the patent statutes

and has never before been construed by this Court. Specifically, the case presents the question, whether the legislative standard of patentability established by Section 103 superseded whatever standard may be gleaned from the decisions of this Court in *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950) and *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84 (1941), and from the subsequent decisions of various Circuit Courts of Appeals in other cases. There has been confusion and disagreement among the several Courts of Appeals with respect to the question, that is, with respect to the interpretation of Section 103 and its relation to prior case law.[1] A definitive and proper resolution of the problems thus created is of great and obvious interest and importance to the public and to the Bar.

This brief is filed with the consent of the parties, and pursuant to authority of the Board of Governors of the American Bar Association.

The Amicus Curiae, of course, has no interest in the outcome of the controversy between the parties, and intimates no views in that connection.

SUMMARY OF ARGUMENT

By Section 103 of the Patent Act of 1952, 35 U.S.C. 103, Congress established a standard of patentability substantially in the language of *Hotchkiss* v. *Greenwood*, 11 How. 248 (1850). The standard thus established was the unobviousness of the invention, at the time it was made, to one having ordinary skill in the

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[1] See *The Standard of Patentability—Judicial Interpretation of Section 103 of The Patent Act*, 63 Col. L.R. 306 (1963).

art to which the invention pertained. By writing this standard into the statute Congress in effect overruled any more exacting test supposedly to be found in certain recent judicial decisions, and reinstated the law of *Hotchkiss* v. *Greenwood.* Judge Learned Hand reached this conclusion in *Lyon* v. *Bausch & Lomb Optical Co.,* 224 F. 2d 530 (CCA 2, 1955), *cert. den.,* 350 U.S. 911, and *Reiner* v. I. Leon Co., 285 F. 2d 501 (CCA 2, 1960), *cert. den.,* 366 U.S. 929. His reasoning and conclusion were sound and should be approved by this Court. The theory that the Patent Act of 1952 made no change in existing case law does not withstand analysis. It is contradicted by one of the expressed purposes of the Act, which was to "revise" the patent laws. It is negatived by statements in the reports of the Congressional committees responsible for the Act. Indeed, this Court, in considering an analogous problem relative to Section 271 of the Act, held in *Aro Manufacturing Co. v. Convertible Top Replacement Co.,* 377 U.S. 476 (1964) that Section 271 reinstated the law of contributory infringement as it was prior to the *Mercoid* case, 320 U.S. 661 (1944), and that the statute thus in effect overruled the *Mercoid* decision. The interpretation placed on Section 103 by Judge Hand is further confirmed by authoritative commentators, including members of Congress and those who took leading roles in the drafting of the Act. Brief colloquies on the Senate floor, sometimes cited as evidence to the contrary, have no value as clues to the proper interpretation of the Act.

Section 103 of the Act is a reasonable and proper exercise by Congress of its Constitutional power to promote the progress of the useful arts by authorizing the grant of patents. In this connection, it should

be noted that a proper construction of Article I, Section 8, Clause 8 of the Constitution is that the power of Congress "to promote the progress of science" relates to copyrights. The word "science" as used in Clause 8 means general "knowledge". The power "to promote the progress of * * * useful arts" relates to patents. The two separate and distinct provisions are combined in the "balanced sentence" of Clause 8. In any event, the Patent Act of 1952 was an expression of legislative judgment as to what would best promote the Constitutional objective. It was a reasonable judgment, of the same type that Congress has made in this field since the first Patent Act of 1790. The role of the judiciary in reviewing such a legislative judgment is a narrow one in any case. In this case the legislative judgment should be conclusive.

ARGUMENT

The Interpretation of Section 103 of The Patent Act of 1952

The Amicus Curiae submits that Section 103 of the Patent Act of 1952, 35 U.S.C. 103, was intended to establish, and did establish, a definitive standard of patentability; and that Section 103 modified the "exacting standard" which the Circuit Court of Appeals for the Eighth Circuit in this case (333 F. 2d 534) found "implicit in the teachings" of *Cuno Engineering Corporation* v. *Automatic Devices Corp.*, 314 U.S. 84 (1941) and *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S.. 147 (1950).

In the case at bar and in previous decisions the Circuit Court of Appeals for the Eighth Circuit has consistently taken the position that Section 103 of the Patent Act embodies the standard of patentability set out by this Court in the *A. & P.* and *Cuno* decisions.

John Blue Company v. *Dempster Mill Mfg. Co.*, 275 F. 2d 668, 671 (CCA 8, 1960); *Caldwell* v. *Kirk Manufacturing Co.*, 269 F. 2d 506, 510 (CCA 8, 1959), *cert. den.* 361 U.S. 915. Other Circuit Courts of Appeals have stated that Section 103 merely "codified" existing case law. *Wesserman* v. *Burgess & Blacher Co.*, 217 F. 2d 402, 404 (CCA 1, 1954); *Interstate Rubber Products Corp.* v. *Radiator Speciality Co.*, 214 F. 2d 546, 549 (CCA 4, 1954); *Bobertz* v. *General Motors Corporation*, 228 F. 2d 94, 99 (CCA 6, 1955), *cert. den.* 352 U.S. 824. As a corollary it has been assumed by these Courts that the law which was codified was the law as laid down in the *Cuno* and *A. & P.* decisions. On the whole it is fair to say that courts adopting these views have disposed of the matter somewhat summarily, without extended discussion or analysis.

To the contrary, the Circuit Court of Appeals for the Second Circuit, in two penetrating opinions by Judge Learned Hand, has held that Section 103 of the Patent Act embodied the "definition of invention" announced by this Court in 1850, in *Hotchkiss* v. *Greenwood*, 11 How. 248, and that the standard of Section 103 has thus been substituted for the "stricter test" found in more recent opinions of this and other courts. *Lyon* v. *Bausch & Lomb Optical Co.*, 224 F. 2d 530 (CCA 2, 1955), *cert. den.* 350 U.S. 911; *Reiner* v. *I. Leon Co.*, 285 F. 2d 501 (CCA 2, 1960), *cert. den.* 366 U.S. 929. Judge Hand's reasoning was that in *Hotchkiss* v. *Greenwood* this Court "imposed an authoritative gloss upon the word [invention] which it put in the following words: 'unless more ingenuity and skill in applying the old method' were necessary 'than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute

essential elements of every invention. * * *' "; that "§ 103 only restores the original gloss, substantially in ipsissimis verbis'"[2]; and that the conclusion is inescapable that "Congress deliberately meant to restore the old definition, and to raise it from a judicial gloss to a statutory command."[3] As Judge Hand observed in his *Bausch & Lomb* opinion, 224 F. 2d 530, 537, "Certainly a legislature, whose will the courts have undertaken to proliferate, must be free to reinstate the courts' initial interpretation, even though it may have been obscured by a series of later comments whose upshot is at best hazy."

We submit that Judge Hand's reasoning and conclusion are entirely sound. The theory, that thePatent Act of 1952 made no change in existing case law, does not withstand analysis.

The Senate report to accompany H.R. 7794,[4] the bill which became the Patent Act of 1952, stated that the "purpose of the proposed legislation is to *revise* and codify the laws relating to patents"[5] (emphasis supplied). With respect to the "requirement for invention" in Section 103, which the report described as one of the "major changes or innovations in the title",[6] the Report stated:[7]

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[2] *Lyon* v. *Bausch & Lomb Optical Co.*, 224 F.2d 530, 535, 536.

[3] *Reiner* v. *I. Leon Co.*, 285 F.2d 501, 503.

[4] Senate Report No. 1979, June 27, 1952, 82nd Congress, Second Session. The House Report (House Report No. 1923, May 12, 1952) was substantially the same. The Senate Report may be found in 2 U.S. Cong. News, 1952, 82nd Cong., Second Session, at pages 2394-2428.

[5] 2 U.S. Cong. News, 1952, 82nd Cong. Second Session at 2394.

[6] 2 U.S. Cong. News, 1952, *supra*, n. 4 at 2397.

[7] 2 U.S. Cong. News, 1952, *supra*, n. 4, at 2399 and 2400.

"Section 103, for the first time in our statute, provides a condition which exists in the law and *has existed for more than 100 years,* but only by reason of decisions of the courts. An invention which has been made, and which is new in the sense that the same thing has not been made before, may still not be patentable if the difference between the new thing and what was known before is not considered sufficiently great to warrant a patent. That has been expressed in a large variety of ways in decisions of the courts and in writings. Section 103 states this requirement in the title. It refers to the difference between the subject matter sought to be patented and the prior art, meaning what was known before as described in Section 102. If this difference is such that the subject matter as a whole would have been obvious at the time to a person skilled in the art, then the subject matter cannot be patented.

"That provision *paraphrases language which has often been used in decisions of the courts,* and the section is added to the statute for uniformity and definiteness. This section should have a stabilizing effect and *minimize great departures which have appeared in some cases.*" (Emphasis added)

As Judge Hand emphasized in his *Bausch & Lomb* and *Leon Co.* opinions, the language paraphrased was that of this Court in *Hotchkiss* v. *Greenwood.* And as he also pointed out in the *Bausch & Lomb* decision, 224 F. 2d at 536, the case "which in expression probably was the furthest departure" was *Cuno Engineering Corp.* v. *Automotive Devices Corp.,* 314 U.S. 84 (1941). There can be little doubt that the *Cuno* case was among the "great departures" to which the report referred.

Moreover, the "Revision Notes", which are a part of the Senate report, make it plain that the second

sentence of Section 103 legislates away the "flash of genius" test of patentability thought by many to have been laid down in the *Cuno* opinion, and applied in some later decisions of lower courts. The notes state:[8]

> The second sentence states that patentability as to this requirement [for non-obvious subject matter] is not to be negatived by the manner in which the invention was made, that is, *it is immaterial whether it resulted from long toil and experimentation or from a flash of genius.* (Emphasis added)

It has been held by Circuit Courts of Appeals that to this extent at least—that is, by negating the "flash of genius" criterion—Section 103 did modify or revise current judicial doctrine. *Pacific Contact Laboratories* v. *Solex Laboratories,* 209 F. 2d 529 (CCA 9, 1954); *R. M. Palmer Co.* v. *Luden's, Inc.,* 236 F. 2d 496 (CCA 3, 1956); *Plax Corporation* v. *Precision Extruders,* 239 F. 2d 792 (CCA 3, 1957); see *Blish, Mize and Silliman Hardware Co.* v. *Time Saver Tools,* 236 F. 2d, 913, 914-915 (CCA 10, 1956).

Confirmation for the view of Judge Hand, that Section 103 codified the case law as it existed prior to recent "departures" in judicial opinions, is found in *Aro Manufacturing Co.* v. *Convertible Top Replacement Co.,* 377 U.S. 476 (1964). The Court in that case considered a question analogous to that involved here, namely, whether Section 271 of the Patent Act of 1952, 35 U.S.C. 271, codified the law of contributory infringement as it existed prior to the decision in *Mercoid Corp.* v. *Mid-Continent Investment Co.,* 320

[8] 2 U.S. Cong. News, 1952, *supra,* n. 4, at 2411; 35 U.S.C.A. 103, note.

U.S. 661 (1944). The Court concluded (377 U.S. 492, 12 L. Ed. 2d 472) that "Congress enacted § 271 for the express purpose of reinstating the doctrine of contributory infringement as it had been developed by decisions prior to Mercoid, and of overruling any blanket invalidation of the doctrine that could be found in the Mercoid opinions." We submit that there could be no more conclusive demonstration of the fallacy of the uncritical statements of some Circuit Courts of Appeals that the Patent Act of 1952 merely "codified" the recent decisions of this Court.

The interpretation placed on Section 103 by Judge Hand is supported by the opinions of authoritative commentators. Thus, Senator Joseph C. O'Mahoney, Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, United States Senate, wrote in 1957 that in "1952 * * * the test of *Hotchkiss* v. *Greenwood* was written into the statutes."[9] Again, Judge Giles S. Rich, of the United States Court of Customs and Patent Appeals, who was one of the drafters of the Patent Act,[10] had this to say:[11]

> * * * there are some things about the Patent Act of 1952 which neither the bar nor the courts seem to have fully comprehended. The bar, of course, takes up opposite sides and confuses the courts,

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[9] *Foreword to Study of The Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, Pursuant to S. Res. 55, 85th Congress, 1st Session, Study No. 7—Efforts to Establish a Statutory Standard of Invention.*

[10] See Rich, *Congressional Intent—or, Who Wrote The Patent Act of 1952,* published at pages 61-78 of *Patent Procurement and Exploitation* (1963), BNA, Inc., Washington, Library of Congress Catalogue Number 63-17943.

[11] Rich, *The Principles of Patentability,* 28 George Washington L.R. 393, 405 (1960); 42 J. Pat. Off. Soc'y., No. 2, Feb. 1960, 75, 88, 89.

so the courts may be forgiven for taking so long to reach *Lyon* v. *Bausch & Lomb, the first opinion, thanks to the perception of Judge Learned Hand, to express clearly what was actually in the minds of the drafters of the act.* (Emphasis added)

* * *

Though one may call Section 103 'codification' it took a case law doctrine, expressed in hundreds of different ways, and put it into statutory language in a single form approved by Congress. In such form it became law superior to that which may be derived from any prior court opinion.

* * * *The Patent Act of 1952 expresses this prerequisite to patentability without any reference to 'invention' as a legal requirement.* Nowhere in the entire act is there any reference to a requirement of 'invention' and the drafters did this deliebrately in an effort to free the law and lawyers from bondage to that old and meaningless term. * * * (Emphasis as in original)

* * * *The act sets as the standard of patentability the unobviousness of the invention, at the time it was made, to a person having ordinary skill in the art.* Therefore, what we have today, and have had since January 1, 1953, is a requirement of *unobviousness,* rather than a requirement of 'invention.' (Emphasis as in original)

In his *Commentary on The New Patent Act,* published in 35 U.S.C.A., Mr. P. J. Federico added further testimony tending to support Judge Hand's thesis. Mr. Federico, Examiner-in-Chief, United States Patent Office, was one of the principal drafters of the Patent Act.[12] Writing in 1954, he said:[13]

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[12] Rich, op. cit. *supra,* n. 10.

[13] 35 U.S.C.A., preceding Sec. 1—at pp. 22, 23.

"There has been some discussion as to whether section 103 modifies the so-called standard of invention (which itself is an unmeasurable quantity having different meanings for different persons) in the courts and it may be correct to state that the printed record does not show an explicit positive command to the courts. While it is not believed that Congress intended any radical change in the level of invention or patentable novelty, nevertheless, it is believed that some modification was intended in the direction of moderating the extreme degrees of strictness exhibited by a number of judicial opinions over the past dozen or more years; that is, that some change of attitude more favorable to patents was hoped for. This is indicated by the language used in section 103 as well as by the general tenor of remarks of the Committees in the reports and particular comments. Weight should be given to the terms used in the section since a variety of expressions used in decisions were available, including some stated with an extreme degree of strictness, which could have been used as the model for the phraseology to be adopted, but the language selected was of the more moderate variety. The Committee Report, in the general part, states that the section 'should have a stabilizing effect and minimize great departures which have appeared in some cases'; the departures of which complaint has been made in the recent past are all departures in the direction of greater strictness and hence these would be what the report indicates should be minimized. * * *"

Two statements on the floor of the Senate at the time the Patent Act was passed, one by Senator Wiley and one by Senator McCarran, are sometimes referred to as indicating that the Act did not relax the strict criteria of recent cases. See e.g. *New Wrinkle, Inc.* v.

Watson, 92 U.S. App. D.C. 137, 138, n. 6, 206 F. 2d 421, 422 (CCA D.C. 1953). These statements were:

> "Mr. Wiley. I wonder whether the Senator will withhold objection * * *. * * * The bill provides for a codification of the patent laws, and the House of Representatives has worked on this subject for 3 or 4 years. The bill simply constitutes a restatement of the patent laws of the United States." 98 Cong. Rec. 9096, 82d Cong., 2d Sess. (July 3, 1952).
>
> "Mr. Saltonstall. Mr. President, will the Senator from Nevada tell us the purpose of the bill?
>
> "Mr. McCarran. The bill would codify the patent laws of the United States. It is under the able guidance of the Senator from Wisconsin [Mr. Wiley].
>
> "Mr. Saltonstall. I am not a patent lawyer, but I know patents are a very technical subject. Does the bill change the law in any way or only codify the present patent laws?
>
> "Mr. McCarran. It codifies the present patent laws. * * *" 98 Cong. Rec. 9323, 82d Cong., 2d Sess. (July 4, 1952).

The statements of Senators Wiley and McCarran have little if any value as clues to the proper interpretation of the Act. In the first place, those who cite the colloquy between Senator McCarran and Senator Saltonstall apparently overlook the fact that immediately following this exchange Senator McCarran inserted in the record a formal written statement on the bill, prepared by him, in which he said, *"In view of decisions of the Supreme Court and others* as well as trial by practice and error *there have been some changes in the law of patents as it now exists* and some new terminology used." (Emphasis added). 98 Cong.

Rec. 9323, 82d Cong., 2d Sess., July 4, 1952. Moreover, the factual and legislative situation existing when Senators Wiley and McCarran spoke was such that their extemporaneous remarks carry little weight. The bill had come up on the consent calendar, shortly before the end of the session. The Senate was obviously in a hurry. There was no debate, in fact the entire proceedings relating to the bill, on both July 3 and July 4, and including Senator McCarran's formal statement, occupy less than three columns in the Record.[14] The remarks of Senator Wiley and Senator McCarran were made in an attempt to stave off objections, which might have killed the bill. The matter has been fully explained by Mr. S. J. Crumpacker, who as a member of the House Judiciary Committee in 1952 played an active part in formulating and passing the Patent Act.[15] Referring to the exchange between Senators Saltonstall and McCarran, which, says Mr. Crumpacker "unfortunately, has been seized upon by some courts as proof that Congress did not intend to change existing case law by the passage of the act," Mr. Crumpacker explains:[16]

> Anyone familiar with the parlimentary situation then existing can draw certain definite conclusions from a close reading of the foregoing. First, Pat McCarran, the chairman of the Senate Judiciary Committee, had very little familiarity with the legislation. It had been handled in his Commit-

[14] The House proceedings when the bill finally passed were even briefer. 98 Cong. Rec. 9451, 82d Cong., 2d Sess, 1952, July 4, 1952.

[15] Crumpacker, *The Patent Act of 1952—A Congressional Perspective*—published in *Proceedings, Section of Patent, Trademark and Copyright Law, American Bar Association, San Francisco, Cal., Aug. 3-9, 1962*, pp. 141-148.

[16] Op. cit. *supra*, note 15 at 145.

tee by Senator Wiley, whose name was on the Senate Report. Second, McCarran was deftly evading, rather than answering, the questions directed to him, while trying to toss the ball to Senator Wiley, (who seems not to have been present at the time). Third, this colloquy is almost entirely meaningless, it being merely an exchange of pleasantries by some senators having little, if any, familiarity with the subject matter they were discussing.

Turning to the statement by Senator Wiley on July 3, 1952, Mr. Crumpacker comments:[17]

> "More damaging was the statement made the day before by Senator Wiley—who did have some familiarity with the legislation. In trying to persuade Senator Hendrickson not to object, he had said:
>
> > "The bill provides for a codification of the patent laws, and the House of Representatives has worked on this subject for three or four years. The bill simply constitutes a restatement of the patent laws of the United States."
>
> One might pause to consider the semantics used—particularly the possible meaning of the word 'restatement'—but this really should not be necessary. The words were said in great haste, without advance preparation, in an effort to avoid controversy. Senator Wiley certainly must have known that the bill was a revision, as well as a codification, of the patent laws. That he did not make this entirely clear in his exchange with Senator Hendrickson is—under the circumstances—understandable. *There is no justification—in my view of the matter—for any court seizing upon these*

[17] Op. cit. *supra*, note 15 at 145, 146.

> *fragments as support for the view that the act was not intended to modify any existing rule of patent law when—as is clearly shown by its own language, as well as the committee reports of the House and Senate—it was in fact intended to be a revision as well as a codification.* (Emphasis added)

In summary, therefore, we submit that Section 103 of the Patent Act was intended to, and does, substitute the test of non-obviousness, as laid down in *Hotchkiss* v. *Greenwood*, 11 How. 248 (1850) for the "hazy" criteria suggested in recent court decisions.

Section 103 Is Consistent With the Constitution

Congressional authority over patents derives of course from Article I, Section 8, Clause 8 of the Constitution, empowering Congress

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

As various commentators have explained,[18] Clause 8 was a consolidation of two separate proposals that had been made to the Constitutional Convention. One proposal was for federal jurisdiction over copyrights, the other for federal authority over patents. The merger of the two proposals resulted in the "balanced sentence" which became Clause 8. Congress was thereby given the power to "promote the progress of science

[18] DeWolf, *An Outline of Copyright Law*, 15 (1925); Flemming, *The Origin of The Patent and Copyright Clause of the Constitution*, 17 Georgetown L.J. 109 (1929); Lutz, *Patents and Science—A Clarification of The Patent Clause of the U. S. Constitution*, 18 George Washington, L. R. 50 (1949); Rich, *Principles of Patentability*, 42 J. Pat. Off. Soc'y. 75, 76-80 (1960); Senate Report 1979, June 27, 1952, *supra*, note 4, at 2396.

* * * by securing * * * to authors * * * the exclusive right to their * * * writings"; and the power to "promote the progress of * * * useful arts, by securing * * * to * * * inventors the exclusive right to their * * * discoveries".

This construction of the Constitutional clause is fortified by the fact that at the time the Constitution was written the word "science", (from the Latin *scire*, to know) meant "knowledge" in any field.[19] The word did not have the more specialized and technical connotation which it now carries. The first Patent Act, passed in 1790,[20] clearly recognized the distinction in its title, which was "An Act to promote the progress of useful arts." The patent acts of 1793,[21] 1794[22] and 1836[23] bore like titles. On the other hand, the copyright law of 1790[24] was entitled "An Act for the encourage-

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[19] Dr. Samuel Johnson's *English Language Dictionary* (1st Amer. ed. 1818) defines "science" as:

1. Knowledge
2. Certainty grounded on demonstration
3. Art attained by precepts, or built on principles
4. Any art or species of knowledge

   I present you with a man Cunning in music and mathematicks. To instruct her fully in those *sciences*. Shaksp.
5. One of the seven liberal arts, grammar, rhetorick, logick, arithmetick, musick, geometry, astronomy.

   Good sense, which only is the gift of heaven, And, though no *science*, fairly worth the seven. Pope.

[20] 1 Stat. 109 (1790).

[21] 1 Stat. 318 (1793).

[22] 1 Stat. 393 (1794).

[23] 5 Stat. 117 (1836).

[24] 1 Stat. 124 (1790).

ment of learning". The word "learning" obviously related to the word "science" in the Constitutional clause. Finally, coming to the present day, we find that both the House and Senate reports on the bill that became the Patent Act of 1952 made it plain that the purpose of Congress in enacting this legislation was to promote progress in "useful arts".[25]

In the first Patent Act of April 10, 1790, 1 Stat. 109, Congress expressed its judgment as to what would promote the progress of useful arts, within the meaning of Clause 8. Thus the Act of April 10, 1790 authorized the Secretary of State, the Secretary of War, and the Attorney General, or any two of them, to issue a patent to any person who "has invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used * * * if they deem the invention or discovery sufficiently useful and important". In subsequent acts over the years the Congress laid down various other guidelines for the implementation of the Constitutional provision.[26] The Patent Act of 1952 is the last in this series of expressions of Congressional judgment and policy. In that Act Congress expressed the judgment that the progress of useful arts would be promoted by application of the standard of unobviousness, as stated in Section 103, as the test of patentability. This certainly was a reasonable Congressional judgment, of the same type that Congress has made in this field since 1790. It is a judgment in on way inconsistent with the Constitutional grant of power to Congress. And in this

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[25] Note 4, *supra*.

[26] Act of Feb. 21, 1793, 1 Stat. 318
Act of July 4, 1836, 5 Stat. 117.
Act of June 22, 1874, R.S. Sec. 4886

connection it must be borne in mind always that the "role of the judiciary in reviewing the legislative judgment is a narrow one in any case." See *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224 (1956); *Berman* v. *Parker*, 348 U.S. 26, 32 (1954); *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 552 (1946); *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 66 (1925). In this case the legislative judgment should be conclusive.

CONCLUSION

The Amicus Curiae submits that the reasoning and conclusions of Judge Hand and the Circuit Court of Appeals for the Second Circuit in *Lyon* v. *Bausch & Lomb Optical Co.*, 224 F. 2d 530, *cert. den.* 350 U.S. 911 (1955) and *Reiner* v. *I. Leon Co.*, 285 F. 2d 501 (1960), *cert den.* 366 U.S. 929, are sound and should be approved by this Court: that Section 103 of the Patent Act of 1952 establishes as the standard of patentability substantially the test announced in *Hotchkiss* v. *Greenwood*, 11 How. 248, and thereby nullifies the more exacting criteria suggested by recent decisions, and that as so interpreted Section 103 is plainly consistent with the Constitution.

Respectfully submitted,

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